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Supreme Court of the United States

No. [redacted] 74

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF AND ARGUMENT.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

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VS.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF AND ARGUMENT.

I.

Respondent claims that the testimony in the instant case is entirely different from the record in the Stoner cases wherein it was held that the evidence was sufficient to warrant a finding of total disability, because in the case at bar, in addition to the record in those cases, the deposition of Mr. Stoner (Tr. 75) and the testimony of Dr. H. J. Ryan (Tr. 85) was introduced.

The record shows that *respondent* took Mr. Stoner's deposition shortly before the trial solely for the purpose of ascertaining whether there was any change in his condition since he testified at the trial of the Stoner case at Gallatin (Tr. 25). That deposition was introduced by petitioner (Tr. 25). A comparison of the testimony in

Mr. Stoner's deposition with his testimony contained in the record in the Stoner cases shows that it is the *same* (Tr. 26-54, 78-82). It is simply a repetition of his testimony previously given, with the additional statement his physical condition had not changed.

The testimony of Dr. Ryan (Tr. 85) shows exactly the same disability as the testimony of Dr. Gray (Tr. 57), Dr. Thompson (Tr. 66) and Dr. Settles (Tr. 70) contained in the record of the Stoner cases. The respondent has not pointed out wherein there is any difference whatever in the facts shown in the record in this case (including the deposition of Mr. Stoner and the testimony of Dr. Ryan) and the evidence in the records in the Stoner cases. There is none. So the evidence in the instant case is the same as that which the Kansas City Court of Appeals in the Stoner cases held was sufficient to sustain a finding of total disability. In the majority opinion of the court below there is no pretense the facts shown in the case at bar differ from those stated in the opinion of the Kansas City Court of Appeals in the Stoner cases and the decision is not put on that ground, but squarely on the ground that the court *was not bound by the decision of the state court of appeals that, within the meaning of the policy, the petitioner was totally disabled if he was unable to perform in the usual and customary manner substantially all the material acts of his occupation, and that the evidence was sufficient to sustain a finding of total disability.*

If we are right in saying that the decision of the Kansas City Court of Appeals is the law of the state, then it is apparent that the majority opinion below is not based

on the law of the state but upon the "general" law, and where that appears the judgment should be reversed (*Ruhlen* v. *N. Y. L. Ins. Co.*, 304 U. S. 202, l. c. 206-7; *Hudson* v. *Moonier*, 304 U. S. 397).

II.

It is claimed (a) that the decisions in the Stoner cases do not forbid "the direction of a verdict for plaintiff" (respondent); (b) that the holding of the Kansas City Court of Appeals that petitioner had a submissible case did not require the trial court to find for him; and (c) the trial court expressly found the facts in favor of respondent.

The state court of appeals did expressly rule that the facts did not show, as a matter of law, that petitioner was not totally disabled within the meaning of the policy and therefore a directed verdict for respondent was forbidden (*Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, l. c. 790-796; *Stoner* v. *New York Life Ins. Co.*, 114 S. W. 2d 167, l. c. 168 *et seq.*).

That court did hold that Mr. Stoner was not, as a matter of law, entitled to recover because he was unable to perform some particular duties of his occupation (*Stoner* v. *New York Life Ins. Co.*, 114 S. W. 2d 167). We do not claim the decision *required* the jury (or the court) to find for petitioner. What that court did hold in both cases was and what we do claim is that, upon the facts, it is a question for the jury (or a court sitting as a jury) to say whether plaintiff was totally disabled under the rule of law announced by the court, upon a consideration of all the evidence relating to his occupation as a

whole. Our contention is that the trial court did find that he was totally disabled; that there was substantial evidence to support that finding and the court below had the right only to inquire whether there was substantial evidence to support that finding; and it did not have the right to sit as another jury and make a finding of its own (*State Farm Mutual Auto Ins. Co.* v. *Coghran*, 303 U. S. 485).

III.

The district court did not find the fact of total disability in favor of respondent. The court filed a memorandum opinion. It is no part of the record. In that opinion the court did describe the physical condition of the petitioner as he found it from observing the petitioner and the evidence. There is not and never has been any controversy about it. Respondent, after admitting it (Tr. 75), proved it. It is conceded that the only physical injury Mr. Stoner suffered was to his left leg and ankle that became ankylosed. No other part of his body was injured (Tr. 65). Now the ultimate fact required to be found was *to what extent that physical condition disabled petitioner.* Upon that issue the trial court made this one finding:

"We make this—

Finding of Fact.

From May 29, 1936, until January 7, 1938, the defendant was totally and presumably permanently disabled by reason of the injury described by him June 29, 1931. Exceptions allowed" (Tr. 102).

A finding as to what is one's physical condition is one thing; a finding as to what extent that physical condition affected ability to work is quite another. The memorandum opinion (though not a part of the record) discloses that the district court believed that the evidence did not show that petitioner was able to engage in any business (Tr. 101). The trier of the fact found that petitioner's disability was total, In the court below respondent did not claim that the district court had not so found. Its contention was that there was no evidence to support that finding.

IV.

It is contended that *Russell* v. *Todd*, 60 S. Ct. 527, 84 L. Ed. 517, decides that the federal courts are bound only by the decision of the highest courts of the state, and therefore the decisions of the courts of appeals of Missouri do not declare the law binding upon the federal courts, but are only persuasive.

In that case there was no definite ruling by the New York Court of Appeals on the law involved. This court followed the ruling of the appellate division of the Supreme Court of New York and used this language:

> "In the absence of a definite ruling by the highest court of the state, we accept the decision of the appellate division and the reasoning of the court of appeals on which it rests as persuasive that the three-year statute does not apply," etc.

Respondent overlooks the fact that the appellate division of the Supreme Court of New York is not a court of last resort, but is an intermediate court from whose

decisions an appeal lies to the court of appeals. In Missouri no appeal lies from a decision of any of its courts of appeals. Under its constitution and the decisions of its Supreme Court, with respect to controversies over which the Kansas City Court of Appeals (or the Springfield or St. Louis Court of Appeals) has jurisdiction, it is the court of last resort (*State ex rel. Winters* v. *Trimble*, 315 Mo. 1295, l. c. 1301); and right or wrong, its decisions are binding on the Supreme Court on certiorari, if there be no prior conflicting decision of that court (*State ex rel. Security Ins. Co.* v. *Trimble*, 318 Mo. 173, l. c. 178; *Fairchild* v. *Lohman*, 13 F. 2d 252, l. c. 254).

A court of last resort, within its jurisdiction, is the highest court of the state. This court has held that the court of a justice of the peace is the highest court of the state, where there is no appeal from his decision to a higher state court, to which a writ of error lies from this court. And because a Missouri court of appeals, within its jurisdiction, is the highest court of the state, writs of error issue from this court to it.

The law is succinctly stated thus:

> "The decision of an intermediate appellate court is the law of the state or jurisdiction until such decision is reversed or overruled by the court of last resort, and the duty of a lower court to follow such decision is not affected by the fact that it is contrary to the decisions of the court of last resort of a sister state on the same question. But a decision of an appellate court, not of last resort, which is not in accord with the decisions of the court of last resort, is not authoritative.
>
> "Where there are several appellate courts or divisions with co-ordinate jurisdiction, an inferior court

in one division or district should follow the decisions of the appellate court of another division or district as to a matter which has not been passed upon by its own appellate court; but in case there is a conflict between the decisions of such courts or divisions, an inferior court should follow the decisions of its own appellate court" (15 C. J., page 922, Sec. 309, cases cited under note).

It certainly is true, as the Supreme Court of Missouri said in *Poe* v. *Illinois Cent. R. Co.*, 339 Mo. 1025, cited by respondent, that where the Supreme Court *has* spoken, its decision is binding on all the courts of the state. But it is equally true that where the Supreme Court has *not* spoken, the decisions of the state courts of appeals declare the law of the state. It is inconceivable that respondent is correct in saying: "Until the Supreme Court has spoken, there is no law of the state" (Respondent's Brief page 12).

If so, there is no law of the state on thousands of questions settled by repeated decisions of its courts of appeals in cases within their jurisdiction and on which there is no utterance of the Supreme Court. If so, there is no law of this state as to what is meant by "total disability" within the meaning of an insurance policy (assuming the Supreme Court has not decided the question), though all of the courts of appeal have with unanimity decided the question in a multitude of cases extending over a period of nearly a half a century, and those decisions (until the Supreme Court declares to the contrary) are binding on every *nisi prius* court in the state and every litigant who applies to them for judgment. Poor old Missouri.

V.

(a) The $790.70 premiums paid may not be considered in determining the amount in controversy. Petitioner can not recover the premiums paid. He paid them voluntarily knowing his exact condition and the extent of his disability. It was not a payment under a mistake of fact. The case relied upon by respondent, *Lyndon* v. *New York Life Ins. Co.*, 89 F. 2d 78, is not in point. In that case the insured paid the premiums under a mistake of fact; he "had no knowledge he was in a serious condition, had not been so advised, and expected shortly to return to his normal duties"; and the payments were made because he thought he was not totally disabled, and therefore was required to make them. In the case at bar petitioner paid the premiums voluntarily at a time when he knew his exact condition, when he claimed to be totally disabled and when he knew that if he was totally disabled he was under no obligation to pay. Under such circumstances he could not recover the payments if he would (cases cited in *New York Life Ins. Co.* v. *Talley*, 72 F. 2d 715, l. c. 719).

(b) This is an action seeking a declaratory judgment. In order to confer jurisdiction there must be an actual existing controversy; and where the defendant's answer denies there is any existing controversy the plaintiff must prove one does exist. The petition alleged this existing controversy: That the defendant "*is insisting* that there is *now* due him" $2,375 disability payments "and that he is entitled to have the premiums falling due on said policies during said period in the amount of $790.70 waived, and

said amount so paid for premiums refunded to him, making a total of $3,165.70 for which defendant *is making demand* of payment upon plaintiff, and which plaintiff denies that defendant is entitled to under the provisions of said policies of insurance" (Tr. 8). The answer denied "that he is claiming or ever claimed to the plaintiff that he was entitled to have the premiums falling due on said policies in the sum of $790.70 waived. This defendant admits that he has paid said premiums during said period, but denies that he has ever claimed to the plaintiff that he is entitled to a refund of said premiums so paid or any part thereof; and denies that he ever demanded the repayment of said sum or any part thereof; and denies he is demanding the same now; and denies that any controversy exists or ever existed between the plaintiff and defendant with respect to the right of the defendant to have said sum of $790.70 or any part thereof so paid on account of said premiums refunded to him" (Tr. 15).

The controversy on which the plaintiff relied was an existing controversy based upon the demand which it was alleged the defendant was making for a return of the premium paid. It was incumbent upon the plaintiff to prove that controversy. It is now suggested that while the defendant has never demanded repayment, has never claimed and is not claiming now that he is entitled to any refund, yet he *might* hereafter claim a return of the premiums if he is successful in establishing total disability. The fact that he *might* in the future claim something he has never claimed does not create an existing controversy, and if it did, no such possible controversy was pleaded or proved.

Petitioner renews his prayer for a writ of certiorari and a reversal of the judgment below.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

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